

**IN THE MATTER OF THE *SECURITIES ACT*,  
R.S.O. 1990, c. S.5, AS AMENDED**

**AND IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC., GO-TO  
SPADINA ADELAIDE SQUARE INC., FURTADO HOLDINGS INC.,  
and OSCAR FURTADO**

File No. 2022-8

**AMENDED MOTION  
OF OSCAR FURTADO**

For a Stay of Proceedings under Rule 28 of the  
Capital Markets Tribunal's *Rules of Procedure and Forms*

**A. ORDER SOUGHT**

The moving party, Oscar Furtado, requests, with notice, that the Capital Markets Tribunal (the "**Tribunal**") make the following order(s):

- (a) An order staying the proceeding against Mr. Furtado under Tribunal File No. 2022-8 (the "**Enforcement Proceeding**"); or
- (b) In the alternative, ~~such further relief as counsel may advise and the Tribunal may permit.~~  
an order prohibiting the use or introduction into evidence by Staff of the Ontario Securities Commission ("**Staff**") of any of the Compelled Evidence, as defined below, at the Enforcement Proceeding; or
- (c) In the further alternative, an order prohibiting the use or introduction into evidence by Staff of any of the transcripts from Mr. Furtado's Compelled Interviews, as defined below, at the Enforcement Proceeding; or
- (d) Such further relief as counsel may advise and the Tribunal may permit.

## B. GROUNDS

### Overview

2. As described below, this motion flows from the intentional and unlawful public disclosure by the Ontario Securities Commission (the “**Commission**”), acting through its Enforcement staff (“**Staff**”), of compelled evidence in the Receivership Application (as defined below) and the subsequent conduct of the Commission in collaterally attacking the squarely applicable decision of its own adjudicative Tribunal (now, the Capital Markets Tribunal) in *Sharpe (Re)*, 2022 ONSEC 3 (“*Sharpe*”). ~~The totality of the Commission’s conduct, as set out herein, amounts to an abuse of process for which the only appropriate remedy is a stay of proceedings.~~

3. The totality of the Commission’s conduct, as set out herein, amounts to an abuse of process for which the Tribunal should order a stay of proceedings. Alternatively, if the Tribunal does not grant a stay, the Tribunal should preclude Staff from using or entering into evidence any of the unlawfully disclosed Compelled Evidence or, at minimum, the transcripts from Mr. Furtado’s Compelled Interviews, in the Enforcement Proceeding. There has been an intentional breach of the Securities Act, R.S.O. 1990, c. S.5 (the “**Act**”) resulting in the violation of Mr. Furtado’s privacy rights and expectations. A remedy is required.

4. ~~3.~~ In particular, the Commission<sup>1</sup>, through Staff, publicly disclosed confidential compelled evidence of Mr. Furtado and other witnesses (together, the “**Compelled Evidence**”) in an

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<sup>1</sup> At the time, the Commission was one entity with both regulatory and adjudicative functions. On April 29, 2022, the proclamation of the *Securities Commission Act, 2021*, S.O. 2021, c. 8, Sched. 9 effectively separated the regulatory and adjudicative functions of the Commission, including through the establishment of the Capital Markets Tribunal as a division of the Commission. Accordingly, any reference to “Commission” in these materials in relation to events that took place prior to April 29, 2022 should be understood to mean a reference to the Commission as it was at that time – an integrated entity which carried out both regulatory and adjudicative functions.

application to the Ontario Superior Court of Justice (the “**Receivership Application**”) seeking: (i) the appointment of a receiver over the Go-To entities pursuant to s. 129 of the Act ~~*Securities Act*~~, R.S.O. 1990, c. S. 5 (the “**Act**”), and (ii) the continuation of two *ex parte* freeze directions (together, the “**Freeze Directions**”) freezing funds held in Mr. Furtado’s investment account which had been issued by the Tribunal on that same day (December 6, 2021) pursuant to s. 126 of the Act.

5.     ~~4.~~ In contravention of the confidentiality provisions in the Act, Staff disclosed the Compelled Evidence without first obtaining the requisite authorization (a s. 17 order) from the Tribunal.

6.     ~~5.~~ When the Commission decided to publicly disclose the Compelled Evidence, the issue of whether such disclosure was permissible under the Act absent a s. 17 order from the Tribunal was scheduled to be heard in a week’s time in an application brought in the *Sharpe* proceeding. Staff and the Commission were well aware of this fact; yet, chose not to bring it to the attention of the court or the parties on the return of the Receivership Application.

7.     ~~6.~~ In an unprecedented and unanimous decision in *Sharpe*, the Tribunal found that the Commission’s disclosure of compelled evidence in connection with its receivership application in that case, absent a s. 17 order, was a breach of its enabling legislation.

8.     ~~7.~~ In this proceeding, the Commission has steadfastly refused to accept the implications of its own Tribunal’s decision in *Sharpe*. Not only has the Commission not taken any steps to have the improperly disclosed Compelled Evidence removed from the public domain, it has, through

outside counsel retained to represent the Commission in the appeal of the order granted in the Receivership Application (the “**Receivership Order**”) before the Court of Appeal for Ontario (the “**Receivership Appeal**”), openly and impermissibly attacked the Tribunal’s decision in *Sharpe*.

~~8. Mr. Furtado now seeks leave to appeal the Court of Appeal’s decision in the Receivership appeal to the Supreme Court of Canada. A decision on the leave application has not yet been rendered.~~

9. The Commission’s course of conduct in respect of the public disclosure of the Compelled Evidence, and following the *Sharpe* decision, should not be allowed to stand.

10. A stay of proceedings is the only appropriate remedy should be ordered in the circumstances. The Commission must finally be required to accept the consequences of its intentional actions. Its conduct ought to be censured so that the integrity of the Commission’s enforcement and adjudicative processes, as the country’s largest securities regulatory authority, is not undermined.

11. Alternatively, Staff should not be permitted to use or enter into evidence the unlawfully disclosed Compelled Evidence at the Enforcement Proceeding (or, at minimum, Mr. Furtado’s transcripts).

12. A remedy is required to appropriately censure Staff/the Commission’s conduct so that the integrity of the Commission’s enforcement and adjudicative processes, as the country’s largest securities regulatory authority, is not undermined.

## Background to the Investigation and Enforcement Proceeding

13. ~~11.~~ Mr. Furtado is the founder of Go-To Developments Holdings Inc. (“**GTDH**”) and the directing mind of Go-To Spadina Adelaide Square Inc. (the “**Spadina Adelaide GP**”), Furtado Holdings Inc. (“**Furtado Holdings**”) and other related Go-To entities that are also respondents in the Receivership Application.<sup>2</sup>

14. ~~12.~~ On April 30, 2019, the Commission issued an order under s. 11 of the Act authorizing Staff to investigate Mr. Furtado, GTDH and other related entities (the “**Investigation Order**”).<sup>3</sup> In the course of their investigation, Staff issued numerous summonses to Mr. Furtado and compelled him to attend three separate interviews held on September 24, 2020, November 5, 2020, and July 7, 2021 (together, the “**Compelled Interviews**”). As required by s. 13 of the Act, Mr. Furtado answered all questions put to him by Staff, with the exception of privilege claims.

15. ~~13.~~ Following the last of the Compelled Interviews, Staff did not substantively communicate with Mr. Furtado for nearly six months, until they served Mr. Furtado with the Receivership Application on less than three days’ notice.

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<sup>2</sup> The other respondents to the Receivership Application are: Go-To Developments Acquisitions Inc., Go-To Glendale Avenue Inc., Go-To Glendale Avenue LP, Go-To Major MacKenzie South Block Inc., Go-To Major MacKenzie South Block LP, Go-To Major MacKenzie South Block II Inc., Go-To Major MacKenzie South Block II LP, Go-To Niagara Falls Chippawa Inc., Go-To Niagara Falls Chippawa LP, Go-To Niagara Falls Eagle Valley Inc., Go-To Niagara Falls Eagle Valley LP, Go-To Spadina Adelaide Square LP, Go-To Stoney Creek Elfrida Inc., Go-To Stoney Creek Elfrida LP, Go-To St. Catharines Beard Inc., Go-To St. Catharines Beard LP, Go-To Vaughan Islington Avenue Inc., Go-To Vaughan Islington Avenue LP, Aurora Road Limited Partnership, and 2506039 Ontario Limited.

<sup>3</sup> Further s. 11 orders dated November 6, 2019, January 14, 2020 and December 10, 2020 removed and appointed members of Staff investigating the matters described in the Investigation Order.

16. ~~14.~~ On March 31, 2022 (the day after the Tribunal’s decision in *Sharpe* was released), Staff issued a Statement of Allegations and Notice of Hearing against Mr. Furtado, GTDH, Furtado Holdings and the Spadina Adelaide GP, commencing the underlying Enforcement Proceeding.

**Decision of the Commission to Publicly Disclose Compelled Evidence in the Receivership Application Contrary to the Act**

17. ~~15.~~ On the evening of December 6, 2021, Mr. Furtado first received notice of the Receivership Application when he was served (through counsel) with the Commission’s application record (the “**Application Record**”). The same day, Staff also moved *ex parte* to obtain the Freeze Directions from the Tribunal, freezing funds held in Mr. Furtado’s investment account.

18. ~~16.~~ In support of the Receivership Application (including the continuation of the Freeze Directions), the Commission, through Staff, publicly filed the Application Record which included an affidavit sworn on December 6, 2021 by Stephanie Collins, Senior Forensic Accountant in the Enforcement Branch of the Commission (the “**Collins Affidavit**”). The Collins Affidavit is 1,958 pages long and attaches 113 exhibits, and is replete with evidence that had been compelled by Staff pursuant to s. 13 of the Act.

19. ~~17.~~ In particular, the Collins Affidavit attaches extensive excerpts from the transcripts of Mr. Furtado’s Compelled Interviews, in addition to those from another compelled witness interview, and other evidence provided by Mr. Furtado pursuant to summonses issued by Staff pursuant to s. 13 of the Act.

20. ~~18.~~ The Commission’s public disclosure of Compelled Evidence was contrary to *Sharpe*, the Act and the law as determined by the Supreme Court of Canada, which recognize the privacy

rights of respondents, impose a scheme of confidentiality and mandate the minimal impairment of respondents' confidentiality and privacy rights.

21. ~~19.~~ In order to bring the Receivership Application, Staff were required to obtain approval by the Chair of the Commission, the Executive Director, or the Chief Administrative Officer. As the decision-making process with respect to such approvals, if any such process exists at all, is opaque, it is not clear whether any analysis of the implications of public disclosure of the Compelled Evidence in this case was conducted and, if so, by whom.

22. ~~20.~~ In any case, in breach of the Act, Staff did not seek a s. 17 order from the Tribunal authorizing disclosure of the Compelled Evidence prior to filing it publicly in the Receivership Application (despite the fact that such an order could have been sought during the notice period).

23. ~~21.~~ At the time, as described below, Staff and the Commission were well aware that the issue of whether the Commission was permitted to publicly disclose compelled evidence without prior authorization under s. 17 of the Act was being actively case managed and was about to be adjudicated in *Sharpe*, and that such disclosure could be found to be (and shortly thereafter was found to be) in contravention of s. 16 of the Act. Staff demonstrated a lack of respect for the jurisdiction of the Tribunal to interpret the Act.

24. ~~22.~~ The Receivership Application proceeded on less than 72 hours' notice on December 9, 2021, despite Mr. Furtado's request for an adjournment on terms that provided reasonable safeguards, including a continuation of the Freeze Directions. It was unnecessary for Staff to move on such short notice and to refuse Mr. Furtado's request for a reasonable adjournment. By

December 2021, Staff's investigation had been ongoing for well over two years and there was no immediate urgency requiring Staff to move on less than the usual ten day notice period under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

25. ~~23.~~ Staff also failed to bring to the attention of the court that there was an issue about whether Staff were permitted under the Act to file compelled interview transcripts without first obtaining an Order from the Tribunal, and that the Tribunal was scheduled to hear submissions on that issue the following week.

26. ~~24.~~ In the Receivership Order issued on December 10, 2021, Justice Pattillo granted the Receivership Application and ordered: (i) the appointment of KSV Restructuring Inc. ("**KSV**") as receiver over the Go-To entities, and (ii) the continuation of the Freeze Directions indefinitely, subject to any revocation or consent to the release of funds by the Commission or further order of the Court.

### **Publication and Reporting on the Application Materials**

27. ~~25.~~ The Receivership Order, as proposed by Staff/the Commission to the court on the Receivership Application, contained directions that the Application Record be posted on KSV's website.

28. ~~26.~~ Shortly after the issuance of the Receivership Order on December 10, 2021, KSV posted the materials filed in support of the Receivership Application, including the Collins Affidavit containing the Compelled Evidence, on its website. The same day, an article was



published in *Insolvency Insider* announcing the Receivership Order and linking to the KSV website containing the Compelled Evidence in the Application Record.

29. ~~27.~~ On December 13, 2021, the Commission posted a press release on its website announcing the granting of the Receivership Order and providing a link to the page on KSV's website containing the Application Record. In short, the Commission made the Compelled Evidence conveniently available to anyone with access to the internet.

### **The Commission's Failure to Raise, and Subsequent Collateral Attack on, *Sharpe***

30. ~~28.~~ In the circumstances, the Commission's public disclosure of the Compelled Evidence in the Receivership Application absent a s. 17 order authorizing such disclosure was itself an abuse of process.

31. ~~29.~~ This abuse of process was exacerbated by the fact that the Commission decided not to advise the court or Mr. Furtado at the Receivership Application that this novel issue was scheduled to be addressed by the Tribunal in the *Sharpe* proceeding in less than 10 days.

32. ~~30.~~ It was unfair and unreasonable to expect Mr. Furtado to raise the issue with the court. Conversely, it was incumbent on Staff, as officers of the court with a duty to uphold and comply with the Act, to provide reasonable notice of the issue.

33. ~~31.~~ Shortly after the issuance of the Receivership Order, Mr. Furtado retained new counsel and commenced the Receivership Appeal.

34. ~~32.~~ In Mr. Furtado's appeal factum dated January 13, 2022, in addition to raising arguments more broadly regarding the lack of procedural fairness in the Receivership Application, Mr. Furtado submitted that Staff had unlawfully disclosed Compelled Evidence by filing the Application Record (including the Collins Affidavit) without having first obtained a s. 17 order from the Tribunal.

35. ~~33.~~ In its responding factum dated March 14, 2022, the Commission (through Staff) took the same positions it had in *Sharpe*, and argued that it was not subject to s. 16 of the Act and therefore could use the Compelled Evidence as it saw fit based on its own conception of the public interest without a prior order authorizing disclosure under s. 17 of the Act.

36. ~~34.~~ On March 30, 2022, the Tribunal released its decision in *Sharpe*, which unequivocally rejected the arguments made by Staff in the Receivership Appeal.

37. ~~35.~~ The Tribunal further found, in *Sharpe*, that the Commission's bypassing of the mechanisms in s. 17 deprived the Tribunal of the opportunity to exercise control over the extent of disclosure and to ensure that such disclosure was minimized, as required by the Supreme Court of Canada in *Deloitte & Touche LLP v. Ontario (Securities Commission)*.<sup>4</sup>

38. ~~36.~~ In his responding factum for the Commission's fresh evidence motion in the Receivership Appeal dated April 4, 2022, Mr. Furtado, in reliance on the newly released decision in *Sharpe*, again raised the issue that the Receivership Order had been granted based on a record replete with improperly disclosed Compelled Evidence, contrary to the Act.

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<sup>4</sup> 2002 CanLII 44980 (Ont. C.A.)

39. 37. At the hearing of the Receivership Appeal, the Commission retained outside counsel and impermissibly re-argued the positions that had been rejected by the Tribunal in *Sharpe*, ***asserting that the Commission's own Tribunal had gotten the interpretation of its enabling statute wrong.***

40. 38. On April 28, 2022, the Court of Appeal dismissed Mr. Furtado's appeal for reasons, *inter alia*, including that Mr. Furtado had not raised the issue of Staff's disclosure of the Compelled Evidence at the hearing of the Receivership Application. This finding was in direct contrast to the Tribunal's finding in *Sharpe* (which proceeded *ex parte*) that Staff ought to have brought the issue to the court's attention.

41. 39. Mr. Furtado has sought leave to the Supreme Court of Canada to appeal the Court of Appeal's decision.

**A Stay of Proceedings is the Only Available Remedy A Remedy is Required**

42. 40. The Commission's blatant breach of its own enabling legislation in publicly disclosing the confidential Compelled Evidence, as described above, was an abuse of process. Its actions fell below the standard of conduct expected of a regulator.

43. 41. The unlawful public disclosure of the Compelled Evidence, including Mr. Furtado's testimony from the Compelled Interviews, in connection with the Receivership Application eviscerated Mr. Furtado's privacy interests. Mr. Furtado was subjected to public opprobrium, loss of livelihood, loss of reputation and civil liabilities while having no opportunity to defend himself from Staff's public allegations.

44. ~~42.~~ The Commission's conduct has also rendered it impossible for Mr. Furtado to have a fair hearing in the Enforcement Proceeding.

45. ~~43.~~ The full extent of the damage caused by the Commission's breaches of the Act cannot be fully and fairly identified given the scope and duration of the Commission's breach of its enabling legislation. Proceeding with the hearing in the face of this misconduct would bring the Commission's enforcement regime and the administration of justice into disrepute.

46. ~~44.~~ A stay of proceedings is the appropriate remedy and is necessary to address the contemptuous disregard exhibited by Staff for their statutory duties and the jurisdiction and powers of the Tribunal.

47. ~~45.~~ Further, and in any event, a remedy is required to address Staff/the Commission's breach of Mr. Furtado's privacy rights and the prejudice caused by the Staff/the Commission to Mr. Furtado's fair hearing rights. At minimum, Staff ought to be precluded from entering into evidence or otherwise using the Compelled Evidence (or, at least, the transcripts of Mr. Furtado's Compelled Interviews) in the Enforcement Proceeding.

48. There is a direct temporal and contextual connection between the Commission's unlawful disclosure of the Compelled Evidence in the Receivership Application and the Enforcement Proceeding. The Compelled Evidence relied upon by Staff/the Commission in both proceedings commenced under the Act was collected under terms of confidentiality in a single investigation authorized by the Commission.

49. In the circumstances, if the Enforcement Proceeding is to continue, a remedy is required to sanction the Commission's conduct and avoid bringing the administration of justice in disrepute. The relief sought by Mr. Furtado is proportionate and, if ordered, will communicate to Staff and confirm to the public that the Commission is required to abide by the rule of law in the performance of its statutory functions.

50. ~~46.~~ The interests served by the granting of a stay of proceedings far outweigh the interests in permitting the Enforcement Proceeding to carry on.

**C. EVIDENCE**

51. ~~47.~~ The moving party intends to rely on the following evidence for the motion:

- (a) The affidavit of Carly Vande Weghe, sworn on January 16, 2023; and
- (b) Such further and other evidence as counsel may advise.

**DATED** this ~~16<sup>th</sup>~~ 2<sup>nd</sup> day of ~~January~~ March, 2023.

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